

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 7312/2019

LNJ Power Ventures Ltd., Having Its Office Address At Plot No. 201, Third Floor, Okhla Industrial Estate Phase-Iii, New Delhi-110020, Through Its Authorized Representative Sh. Ranjeet Singh, S/o Dr. Rumail Singh, Aged About 33 Years, R/o Plot C-7, Flat E-104, Akanksha Apartment Ramprastha, Ghaziabad, Uttar Pradesh 201011.

-----Petitioner

Versus

1. Rajasthan Electricity Regulatory Commission, Through Its Secretary, Having Its Address At Vidhyut Viniyamak Bhawan, Sahakar Marg, Near State Motor Garage, Jaipur, Rajasthan- 302001.

2. State Of Rajasthan, Through Principal Secretary, Department Of Energy, Government Of Rajasthan, Having Its Address At Vidyut Bhawan, Janpath, Jyothi Nagar, Jaipur, Rajasthan -302005.

3. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Through Its Managing Director, Having Its Address At Vidyut Bhawan, Jyothi Nagar, Jaipur Rajasthan- 302005.

4. Ajmer Vidyut Vitran Nigam Limited, Through Its Managing Director, Having Its Address At Vidyut Bhawan, Panchsheel Nagar, Makarwali Road, Ajmer, Rajasthan-305004.

5. Rajasthan Renewable Energy Corporation, Limited Through Its Managing Director, Having Its Address At E-166, Yudhisthir Marg, C-Scheme, Jaipur, Rajasthan, 302001.

-----Respondents

For Petitioner(s) : Mr. Parag Tripathi with
Mr. Aniket Prasoon
Mr. Falgun Buch - on VC.

For Respondent(s) : Mr. M.S. Singhvi, Senior Advocate &
Advocate General assisted by
Mr. Akhilesh Rajpurohit - VC.

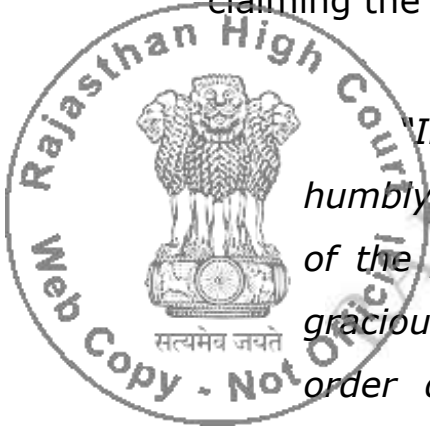
HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI



Order

06/01/2022

1. In wake of instant surge in COVID-19 cases and spread of its highly infectious Omicron variant, lawyers have been advised to refrain from coming to the Courts.
2. The matter comes up on the second stay application, claiming the following reliefs:



"In view of the aforesaid submission, it is most humbly prayed that pending the hearing and disposal of the present Writ Petition, this Hon'ble Court may graciously be pleased to grant ad-interim ex-parte order directing stay against the operation of the Impugned Letter dated 17.12.2021 bearing ref. no.AVVNL/ACE (HQ)/SE(C)/F./2021/22/D.NO.3481, and further direct the Respondent No.4 to keep in abeyance the Invoice for the Billing Month of December 2021. In addition, the Respondent No.4 be directed to not take any steps to give effect to the Impugned Letter and/or not take any coercive steps against the Applicant, including on the basis of the Respondent No.1's order dated 08.05.2019 in Petition No.RERC/1327/2018 titled as "M/s. Tesco Energy Two Private Limited Vs. Rajasthan Rajya Vidyut Prasaran Nigam Limited" in the interim, pending the final disposal of the present Writ Petition."

3. However, learned counsel for the petitioner, while reiterating the prayers made in the present writ petition, advanced his submissions at length on the merits of the case.

For ready reference, the prayer clauses of the writ petition read as under:-



"(a) By an appropriate order, direction or order, the Hon'ble Court may kindly be pleased to declare that in terms of Section 2(8) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005, the proposition laid down by the Respondent No. 1/RERC in its Order dated 08.05.2019 (Annex. 1) in Petition No. 1327/18 is not a correct position of law and is not be acted upon vis a vis the Petitioner;

(b) By an appropriate order, direction or order, Respondents be restrained from taking any steps against the Petitioner in terms of Respondent No. 1/RERC's Order dated 08.05.2019 (Annex. 1) in Petition No.1327/18 without being heard and without being a notice inspiring such action;

(c) By an appropriate order, direction or order, if during the pendency of the Writ Petition, if any notice and/or order is issued by any of the Respondents in terms of Respondent No.1/RERC's Order dated 08.05.2019 (Annex 1) in Petition No.1327/18, the same may be quashed and set aside;

(d) By an appropriate order, direction or order, if any such order is issued, the effect and operation of same may kindly be stayed."

4. Learned counsel for the petitioner has drawn the attention of this Court towards the interim order dated 28.05.2019 passed in the present petition, which reads as under:

"Issue notice to the respondents, returnable in four weeks.

In the meanwhile, no coercive action shall be taken against the petitioner regarding the dispute in question."

5. Learned counsel for the petitioner thereafter submits that the present petition was filed as a pre-emptive measure against the



operation of the order dated 08.05.2019 in Petition No. RERC – **1327/2018 (M/s Tesco Energy Two Private Limited Vs. Rajasthan Vidyut Prasaran Nigam Limited & Anr.)** passed by respondent No.1-Rajasthan Electricity Regulatory Commission (“RERC”).

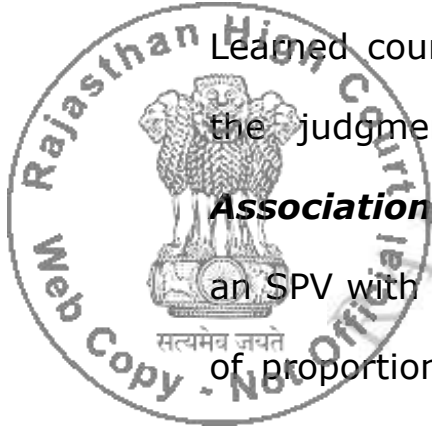
6. Learned counsel for the petitioner further submits that the interpretation of ‘Captive Generating Plant’ (“CGP”), whereunder a sole captive user holding 26% of the equity shareholding in the Special Purpose Vehicle (“SPV”) (which owns and operates the CGP) could procure 100% power from such power plant under the captive agreement, has been incorrectly and wrongly made in the impugned order dated 08.05.2019, and thus, the same is adversely affecting the interest of the present petitioner.

7. Learned counsel for the petitioner also submits that the respondent No.1-Commission, while passing the impugned order dated 08.05.2019, has placed reliance on the judgment dated 22.09.2009 rendered by the Hon’ble Appellate Tribunal for Electricity (*for short, ‘Hon’ble Tribunal’*) in **Kadodara Power Pvt. Ltd. & Ors. Vs. Gujarat Electricity Regulatory Commission & Ors. (Appeal No.171 of 2008)**. Further, learned counsel submits that the judgment rendered in **Kadodara Power Pvt. Ltd. (supra)** itself was held to be *per incuriam* vide a subsequent judgment rendered by the Hon’ble Tribunal itself in **Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission and Ors., 2021 SCC Online APTEL 19**, relevant portion of which reads as under:

“263. We cannot permit unreasonable hardship to be caused to a captive generating plant,



set up by a special purpose vehicle, by applying the above judgment of this Tribunal in ignorance of vital facets governing the framework of Rule 3 and also important judicial decisions as noted above. In light of this, we have no hesitation to hold that the decision of the Tribunal in Kadodara judgment (supra) to the extent it equates a SPV and an AOP is 'per incuriam' ..."



Learned counsel thus submits that in the aforequoted portion of the judgment rendered in **Tamil Nadu Power Producers Association (supra)**, the Hon'ble Tribunal has held that equating an SPV with an Association of Persons (AOP) and applying the rule of proportionality, to an SPV, as was done in **Kadodara Power Pvt. Ltd. (supra)**, is not in consonance with the statutory requirements, for being a Captive Generating Plant under the Electricity Rules, 2005 (*for short*, 'Rules of 2005').

Thus, as per learned counsel, since the judgment rendered by the Hon'ble Tribunal in **Kadodara Power Pvt. Ltd. (supra)**, which was the sole basis of passing of the impugned order dated 08.05.2019, was held to be *per incuriam* vide the subsequent judgment rendered by the Hon'ble Tribunal itself in **Tamil Nadu Power Producers Association (supra)**, therefore, the impugned order cannot be sustained in the eye of law.

8. Learned counsel for the petitioner further submits that though the judgment rendered by the Hon'ble Tribunal in **Tamil Nadu Power Producers Association (supra)** is under challenge before the Hon'ble Supreme Court, in Diary Nos. 22360/2021 & 21493/2021, but till yet, no effective order has been passed



therein, and thus, the judgment rendered in **Tamil Nadu Power Producers Association (supra)** is still governing the field.

9. Learned counsel for the petitioner, while referring to the aforequoted interim order dated 28.05.2019 passed by this Court in the present case, restricting the respondents from taking any coercive action against the petitioner, regarding the dispute in question, submits that despite such directions, respondent No.4-Ajmer Vidyut Vitran Nigam Ltd. ("**AVVNL**") raised invoices on the petitioner, for the billing period December 2021 ("**impugned invoice**"), thereby while calculating the adjustments qua the supply of power in the month of October 2021, the transaction between the petitioner and RSWML has been considered as a non-captive transaction; and that the same has also been mentioned in the letter dated 17.12.2021 ("**impugned letter**") issued by AVVNL to RSWML, in light of the impugned order dated 08.05.2019.

Learned counsel thus submits that until said impugned invoice was raised, AVVNL was maintaining status quo, thereby acting in accordance with the aforementioned interim order dated 28.05.2019, for a period of more than 29 months i.e. from 28.05.2019 until October 2021, while treating the petitioner as a Captive Generating Plant.

10. Learned counsel for the petitioner also submits that in light of the judgment rendered in **Tamil Nadu Power Producers Association (supra)**, the impugned invoice and the impugned letter have been rendered infructuous, in view of the settled legal maxim of '*sublato fundamento cadit opus*' (once the foundation is removed, the superstructure falls).



11. Learned counsel for the petitioner further submits that the view taken in the judgment rendered in **Kadodara Power Pvt. Ltd. (supra)** in 2009, was that if there is an SPV or a joint venture which is a generator and has more than one party, then in order to get a benefit of captive consumer, the shareholder should get an equivalent share of electricity. As per learned counsel, in the present case, there are only two shareholders; the shareholding of the applicant-Company vests with M/s. Hero Wind Energy Pvt. Ltd. and RSWML in the ratio of 74 : 26, and RSWML, which owns merely 26% shareholding is consuming 100% energy.

12. As against the aforesaid detailed and final submissions made on behalf of the petitioner on merits of the case, Mr.M.S. Singhvi, learned Senior Counsel & Advocate General assisted by Mr. Akhilesh Rajpurohit appearing on behalf of the respondents, raised certain preliminary objections as to the maintainability of the present writ petition, while submitting that an alternative remedy is available to the petitioner.

13. Learned Advocate General has drawn the attention of this Court towards Section 125 of the Electricity Act, 2003 (for short, 'Act of 2003) which reads as follows:

"125. Appeal to Supreme Court.- Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said



period, allow it to be filed within a further period not exceeding sixty days.”

14. Learned Advocate General further submits that the entire mechanism of appeal, thus has been laid down by the Act of 2003 and the appropriate Forum for the purpose of preferring an appeal would thus be the Hon'ble Supreme Court.

15. Learned Advocate General also submits that the petitioner's cause of action did not arise on the date of filing of this writ petition, in 2019, but in fact arose on 17.12.2021 (on the date of issuance of the impugned letter), and thus, the petitioner in fact is seeking a declaratory order from this Court.

16. Learned Advocate General subsequently raises the question as to whether a person, in apprehension of a future injury, can seek remedy through a writ before a Constitutional Court.

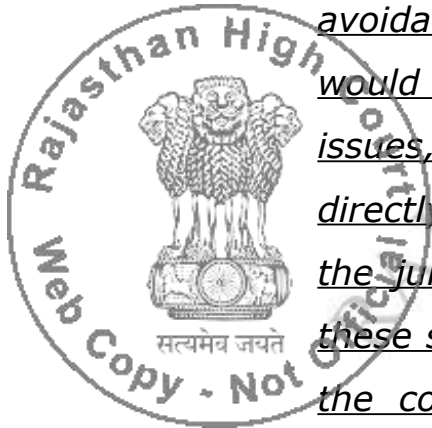
17. Learned Advocate General further submits that on multiple occasions, the Hon'ble Supreme Court has observed that the appropriate Forum for preferring an appeal against an order of a Tribunal would be the respective Appellate Tribunal, and subsequently, the Hon'ble Supreme Court itself.

18. In order to substantiate his aforesaid submissions, the learned Advocate General relied on the precedent law laid down by the Hon'ble Supreme Court in ***L. Chandra Kumar Vs. Union of India and Others, (1997) 3 SCC 261***, relevant portion of which reads as under:-

“90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts



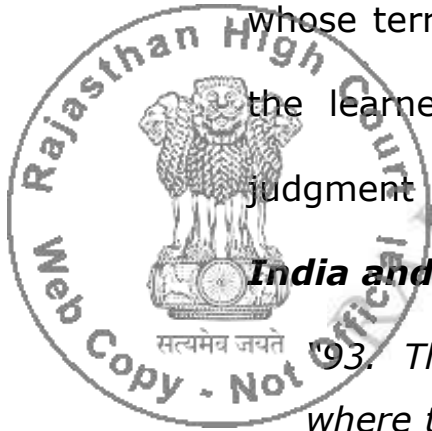
under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter."





19. Learned Advocate General also submits that in the aforesaid judgment, the Hon'ble Supreme Court has referred to a judgment rendered in the case of **R.K. Jain Vs. Union of India (1993) 4 SCC 119**, wherein a suggestion was made on the possibility of an appeal being taken from a Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls. In this regard, the learned Advocate General referred to para 93 of the judgment rendered in **L. Chandra Kumar Vs. Union of India and Others (supra)**, which reads as under:

93. *The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the*





Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.”

Learned Advocate General thus submits that the Hon'ble Supreme Court in the above-mentioned case directed listing of all the matters before a Division Bench of the respective High Court, in light of the observations made therein.

20. Learned Advocate General also submits that only in the case of a question arising as to the jurisdiction of a Tribunal, a writ petition before the High Court would be maintainable, and not otherwise.

In this regard, learned Advocate General placed reliance on the precedent law laid down by the Hon'ble Supreme Court in ***Cicily Kallarackal Vs. Vehicle Factory (2012) 8 SCC 524***, while submitting that in the said judgment it was observed that when a statutory procedure for appeal is provided in the legislation, it would not be appropriate for High Courts to then entertain writ petitions under Article 226 of the Constitution of India, which would result in bypassing the procedure provided for a statutory appeal.

21. Learned Advocate General also placed reliance on the precedent law laid down by the Hon'ble Supreme Court in ***Union***



of India and Ors. Vs. Major General Shri Kant Sharma and Anr. (2015) 6 SCC 773.

22. Learned Advocate General also while drawing this Court's attention to a judgement rendered by a Division Bench of this Hon'ble Court in **Balotra Water Pollution Control & Research Foundation Trust (BWPCRT) Vs. State of Rajasthan & Ors.**

(D.B. Civil Writ Petition No. 10986/2015, decided on 08.10.2015), submits that in the said judgment, the Hon'ble Division Bench was disinclined to invoke the writ jurisdiction vested with it, owing to the fact that an alternate remedy was available to the petitioner by way of filing an appeal before the Hon'ble Supreme Court.

23. However, thereafter, the learned Advocate General submits that for the present, he wishes to confine his arguments only to the extent of the aforementioned preliminary objections, while reserving his right to make detailed and final submissions on the merits of the case; thus, he prays for some time to enable him to do so, if so required. The proposition is genuine in the eye of this Court.

24. Learned counsel for the petitioner, in response to the aforesaid preliminary objections raised on behalf of the respondents submits that the petitioner could not prefer an appeal before the Rajasthan Electricity Regulatory Commission, as it was not party to the particular case before the Tribunal.

25. As to the maintainability of the writ petition before this Court, learned counsel for the petitioner placed reliance on the precedent law laid down by the Hon'ble Supreme Court in **Whirlpool Corporation Vs. Registrar of Trade Marks,**



Mumbai and Ors., (1998) 8 SCC 1 relevant portion of which reads as under:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, prohibition, Quo Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose.

17. Specific and clear rule was laid down in **State of U.P. v. Mohd. Nooh, MANU/SC/0125/1957 : [1958] 1 SCR 595**, as under:

"But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

19. Another Constitution Bench decision in **Calcutta Discount co. Ltd. v. Income Tax Officer Companies Distt, I MANU/SC/0113/1960 : [1961] 41 ITR 191 (SC)** laid down: "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction Under Section 34 I.T. Act".



26. Learned counsel for the petitioner, in his rebuttal to the preliminary objections, also relied upon the judgment rendered in **Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Ors. (1961) 2 SCR 241**, while submitting that in the said case, the Hon'ble Calcutta High Court had allowed a writ petition under Article 226 of the Constitution of India against an order passed by the an executive authority i.e. the Income Tax Officer, and thereafter, the Constitution Bench of the Hon'ble Supreme Court in Para. 29 of the judgment observed the following: -

"29. ... When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons ..."

27. Learned counsel for the petitioner further submits that on the last occasion, the learned Advocate General assured the Court that no coercive actions or steps would be taken against the petitioner and an order in regard thereto was in operation as well, but on 17.12.2021, in violation of the same, respondent-Ajmer Vidyut Vitran Nigam Limited issued a communication to the petitioner raising a demand to the tune of Rs.55,47,354/- in the impugned invoice.

28. Learned counsel for the petitioner further submits that the present case at hand involves a substantial and pure question of law, i.e. 'Whether a Special Purpose Vehicle ("SPV") may be an



Association of Persons” and therefore, the writ petition so filed by them before this Court is maintainable.

29. Learned counsel for the petitioner, in rebuttal, also submits that in order to avoid lengthy drawn out proceedings and unnecessary harassment to the parties, it would be in the interest of justice if the final adjudication is made, after hearing the case on merits.

30. Learned counsel for the petitioner, in summation, submits due to the following, the petitioner is entitled to seek a writ remedy before the High Court;

(a) Since the petitioner is not a party to the **TESCO (supra)** judgment, therefore, it cannot file an appeal and does not possess any effective alternate remedy.

(b) The judgment rendered in **Whirlpool Corporation (supra)**, with respect to availability of an alternate remedy, enables the petitioner to seek relief before this Court.

31. Learned Advocate General, at this stage, again drew this Court’s attention to Section 125 of the Act of 2003, which states that ‘*Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal before the Supreme Court ...*’ and therefore, it does not necessitate that such aggrieved person has to be a party to the earlier suit and therefore, there exists a proper system for grievance redressal and the appropriate Forum to prefer an appeal would thus be the Hon’ble Supreme Court.

32. Heard learned counsel for the petitioner on merits of the case as well as considered the preliminary objections raised on



behalf of the respondents, alongwith the record of the case and the judgments cited by both the sides.

33. This Court, upon a perusal of the impugned order dated 08.05.2019, finds that the following was held by the learned RERC:

(a) The Commission observed that in the judgment passed by the Hon'ble Tribunal in **Kadodara Power Pvt. Ltd. (supra)**, it was held thus:

Nonetheless, reading the entire Rule 3 as a whole it does appear to us that a CGP owned by a special purpose vehicle has to be treated as an association of person and liable to consume 51% of his generation in proportion to the ownership of the plant. Every legal entity is the person. Therefore, the special purpose vehicle which has to be a legal entity shall be a person in itself. Any generating company or a captive generating company is also a person. The Rules specially deals with cooperative society. In an association of persons it has to be a 'person' because without being a person it cannot set up a captive generating plant. Therefore it will be wrong to say that since the special purpose vehicle is a 'person' in itself it cannot be covered by a definition of 'association of persons' and has to be covered by the main provision which requires the owner to consume 51% or more of the generation of the plant. In our view the definition is somewhat strange in as much as the term 'person' is said to include an 'association of persons'. One therefore cannot say that a CGP owner can be either a 'person' or an 'association of persons' a special purpose vehicle thus can be a 'person' as well as an 'association of persons'. A cooperative A. No. 171 of 2008, A. No. 172 of 2008 & IA Nos. 233/08 and 234/08, A. No. 10 of 2008 and A. No. 117 of 2009 SH society is an 'association of persons' in the sense that some persons come together to form a cooperative society. However, the moment an association or society is formed according to the legal provisions it becomes a person in itself. A special provision



has been made permitting a cooperative society from consuming 51% collectively. The first proviso 3 (1)(a)(ii) itself suggests that a special privilege has been conferred on a cooperative society. Other persons who are also legal entities formed by several persons coming together have not been given such special privilege. Who can such association of persons be? Of the various legal entities comprehended as persons owning a CGP the special purpose vehicle does seem to fit the description of 'association of persons'. We fail to comprehend who other than a special purpose vehicle can be an 'association of persons'. None of the lawyers arguing before us gave example of 'association of persons' other than a special purpose vehicle. Therefore, we have no hesitation to hold that special purpose vehicle is an association of persons.

In case the special purpose vehicle was not required to maintain the rule of proportionality of consumption, the Central Government could have specifically mentioned the same just as it has done for a cooperative society. The Rule having not exempted a special purpose vehicle from the requirement of consuming 51% of the generation in proportion to the ownership of the persons forming the special purpose vehicle as has been done in the case of A. No. 171 of 2008, A. No. 172 of 2008 & IA Nos. 233/08 and 234/08, A. No. 10 of 2008 and A. No. 117 of 2009 SH cooperative society it will only be rational and logical to hold that a special purpose vehicle is also subject to the rule of proportionality of consumption to the percentage share of ownership as an 'association of persons'."

(b) The Commission at paras 16 & 18 referred to Section 2(8) of the Act of 2003 and Rule 3 of the Rules of 2005 respectively. The said paras read as follows:

"16. Commission therefore looked into Section 2(8) of the Electricity Act, 2003 and Rule 3 of the Electricity Rules, 2005, which read as under:-

"2(8). "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society



or association of persons for generating electricity primarily for use of members of such cooperative society or association.

(emphasis added)

18. Rule 3 of the Electricity Rules 2005:-

"3. Requirements of Captive Generating Plant.-

(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-

(a) in case of a power plant -

(i) not less than twenty six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent."

(emphasis added)

(c) The Commission, at Para. 22, after making reference to the above judgment rendered by the Hon'ble Tribunal in **Kadodara Power Pvt. Ltd. (supra)**, states that it is clear that a CGP owned by a SPV is an Association of Persons and is subject to the rule of proportionate consumption to the percentage share of ownership as an 'association of persons'.

(d) The Commission observed, at Para. 27, that the shareholders in the company had equity shares in the ratio of 37:37:26 and therefore, have to consume electricity in that proportion to their



shares of the ownership of the plant within a variation not exceeding (+ / -) 10%. But one of the shareholders had proposed to consume 100% of power generated through solar plant, and therefore, the petitioner's (TESCO) plant is not fulfilling the rule of proportionality of consumption to the percentage share of ownership as an association of persons.

(e) The Commission, in light of its aforementioned observations, held that the petitioner's (TESCO) plant did not fall under the definition of 'CGP' as per section 2 (8) of the Electricity Act of 2003 and Rule 3 of the Electricity Rules of 2005, and hence, cannot be treated as a CGP.

34. This Court after a thorough perusal of the multitude of cases cited before it, observes the following, as held by the Hon'ble Supreme Court : -

(a) Exercise of jurisdiction of the High Courts under Article 226 of the Constitution of India is no doubt discretionary, but the discretion must be exercised on sound judicial principles.

(b) High Courts while exercising its jurisdiction under Article 226 of the Constitution of India are duty bound to consider whether a petitioner has any alternative or effective remedy for the resolution of the dispute. And while, the existence of an alternate remedy is not a bar to entertaining of writ petition, the general rule is that the existence of an alternate remedy to the aggrieved person or under the statute in question which contains a mechanism for redressal of grievance, still holds the field. However, High Courts could entertain writ proceedings under Article 226, in exceptional cases, particularly where the cases



involve a pure question of law or vires of an Act are challenged, and it would depend on the given facts and circumstances and would have to be on a case to case basis. The Hon'ble Supreme Court of India took the view that in the interest of administration of justice shall be better subserved if such cases are heard by the High Courts only when they involve primary questions of jurisdiction or which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.

(c) High Courts, while exercising the power under Article 226 of the Constitution of India would take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

(d) The power of judicial review vested in High Courts under Article 226 of the Constitution of India is one of the basic features of the Constitution and any legislation cannot override or curtail jurisdiction of the High Courts under Article 226 of the Constitution of India.

35. This Court is mindful of the fact that the discretion to entertain a writ petition under Article 226 of the Constitution of India entrusted upon the Hon'ble High Courts of India, must be exercised on sound judicial reasoning.

35.1 Firstly, this Court has taken into consideration that the statutory provision of the law under Section 125 of the Electricity Act of 2003, permits 'any person' aggrieved by a decision or order passed by the Hon'ble Tribunal may file an appeal before the Hon'ble Supreme Court, despite not being a party to the said suit before the Hon'ble Tribunal. However, this petition being filed in the year 2019, has come up for



consideration in the year 2022; and any further judicial delay in deciding and disposing the present matter, would not only be inappropriate, but also against the interest of justice.

35.2 Secondly, the action of the respondent no. 4, i.e. the AVVNL, of issuing the impugned invoice and subsequently, the impugned letter, to the petitioner raising a claim of about Rs.55,47,354/-, is *prima facie* in violation of the order dated 28.05.2019, passed by this Court; within which a crystal clear direction was issued to the respondents to refrain from taking any coercive action against the petitioner, with regard to the present dispute.

35.3 Thirdly, *prima facie* it is apparent that the issue in the present petition has been squarely dealt with, and is covered by the principle laid down by the Hon'ble Tribunal in **Tamil Nadu Power Producers Association (supra)** and the action of the respondent no. 4, the AVVNL, is not only illegal and in violation of the judicial order of this Court, but also unreasonable and arbitrary.

35.4 This Court thus finds that in the present case, grant of relief as prayed for in the present writ petition would be in the interest of justice, taking into consideration the constitutional duty cast upon this Court so as to provide the petitioner an opportunity to seek relief from this Court, as was also held by the Hon'ble Supreme Court in **Whirlpool Corporation (supra)** and **Calcutta Discount Company (supra)**.

35.5 This is more so when at this stage, after a pendency of about three years, owing to the peculiar facts of the present case, remanding the matter back to the Hon'ble Tribunal or



disposal of the case on the ground of lack of jurisdiction would be inappropriate, especially since the position of law is settled and has been coherently laid down; and that arbitrariness is smack on the face of the action of the respondent No.4 in the present case.

35.6 Thus, in light of what has been observed above, this Court does not find any substance in the preliminary objections so raised on behalf of the respondents, and the same are accordingly rejected.

35.7 However, in the interest of justice and in view of the request made by the learned Advocate General, this Court, before making any final adjudication on the merits of the case, grants some time to the learned Advocate General to make his detailed submissions on the merits of the case.

35.8 The interim order dated 28.05.2019 passed by this Court is however, confirmed. Both the stay applications i.e. stay application No.7178/2019 and second stay application No.17639/2021 are disposed of accordingly.

35.9 List the writ petition for final hearing on 24.02.2022.

(DR.PUSHPENDRA SINGH BHATI),J.

108-SKant(L)/-